COA Nos.
25935-8-III & 26039-9-III
(consolidated)

No. 82175-5

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VALENTIN SANDOVAL,

Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

D. ANGUS LEE
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A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, Respondent in the Court of Appeals, and Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the Court of Appeals.

C. RESPONSE TO PETITIONER'S ISSUES PRESENTED

1. "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant". Further, "... the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (citations and internal quotation marks omitted).

Defendants are, as Petitioner states, entitled to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984). There is a "strong presumption counsel's representation was effective", and the burden is on the defendant to show deficient representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prove ineffective assistance of counsel, Petitioner must prove both that that the representation provided was deficient, " ... i.e., it fell below an objective standard of reasonableness based on consideration of *all* the circumstances ..." and that prejudice resulted, " ... i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987) (emphasis added).

The test to be used when assessing a claim of ineffective assistance of counsel in the setting of a guilty plea is the same. *Hill v. Lockhart*, *supra*, at 59. The second prong of the test is of course modified to address the contextual differences between a trial and a guilty plea, that is, but for the alleged errors, the defendant would have gone to trial instead of pleading guilty. *Id.* The potential immigration consequences of the guilty plea in this case are identical to those likely to occur if Petitioner had been convicted of

the original charge after a trial. It is not possible for him to sustain his burden. *Id, at 60.*

Petitioner claims that he received unreasonable affirmative misadvice from his counsel at the trial level. Br. of Petitioner seeking discretionary review, at 1. This is not correct. Petitioner's trial counsel did what attorneys do – he made a prediction of what would occur in his client's situation based on his experience. Attorneys do this task on a regular basis, sometimes many times daily, depending on the nature of their practice. As also sometimes happens, the prediction was incorrect. Affidavit of Attorney Robert E. Schiffner, at 2. It is at worst recognition of an issue in another area of the law, and the suggestion to obtain counsel qualified to assist the Petitioner in that area. That is not at all the same as a deliberate or even careless misstatement of the potential collateral consequences of the plea. Petitioner's need to characterize the advise given as affirmative misadvice in order to attempt to vacate his guilty plea does not make the label correct. By that label, Petitioner attempts to force an analytical framework which leads to the conclusion desired.

A true example of an affirmative misstatement of the possible consequences of a guilty plea is a far different matter. Counsel striking out the admonition of possible immigration consequences on the Statement on Plea of Guilty form prescribed by this Court would be an affirmative act that would meet the test proposed by Petitioner. It is not even a provision which allows for the possibility that it will not apply to person pleading guilty to a crime. CP, at 27. Such a fact pattern has been addressed by the Court of Appeals. The Court held that such a striking out was a violation of the statutory right to be advised of the potential immigration consequences of a guilty plea. *State v. Littlefair*, 112 Wn. App. 749, 766, 51 P.3d 116 (2002). This direct violation of the mandates of RCW 10.40.200 is a flaw of a substantially different nature than the one alleged to have been committed by Mr. Sandoval's trial counsel. In fact, the statute itself refers to "... potential consequences of conviction ...", a phrasing similar to the amorphous advice admitted by trial counsel in the instant case. RCW 10.40.200(2); Affidavit of Attorney Robert E. Schiffner, at 2. Petitioner's right to be notified of this potential collateral consequence of pleading guilty was satisfied by the language of the Statement on Plea of Guilty. CP, at 27.

Even if this Court were to somehow conclude that Mr. Schiffner's advice constituted ineffective assistance, Petitioner was not prejudiced by it because he was clearly notified by the plea document of the potential consequences. *Womack v. McDaniel*, 497 F. 3d 998, 1003 (2007), *cert. den.* 128 S. Ct. 928, 169 L. Ed. 2d 767 (2008). In addition, such an error in prediction of the outcome is not prejudicial. *Id*, at 1003-1004 (citations omitted). Further, the self-serving assertions of the Petitioner in his Statement of Additional Grounds for Review are not relevant. He signed the Statement on Plea of Guilty, and went through a detailed colloquy with the Court regarding the Statement and his understanding of it. RP, October 3, 2006, at 3-7. The written Statement on Plea of Guilty filed in the trial court can and should be credited over the later contradictory assertions made by both Petitioner and his trial counsel. *Womack, supra*, at 1004.

In addition, as noted in the State's brief in the Court of Appeals, Petitioner would also have faced a minimum prison sentence 13 times longer if convicted of the original charge, and had the State not faced the logistical problems often associated with proving out of state criminal history, a minimum sentence 17 times longer. It defies logic to assert that such an

immense reduction in the potential length of incarceration is not the outcome of competent defense work, especially when considering that the collateral immigration consequences are identical, but would follow after years in prison.

2. The Court of Appeals did not err in its conclusions as to the obligations of counsel with regard to advising a criminal defendant about the possibility of deportation. "A defendant need not be informed of all possible consequences of his plea, but he must be informed of all direct consequences." *In re the Personal Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "... (a) deportation proceeding that occurs subsequent to the entry of a guilty plea is merely a collateral consequence of that plea." *In re the Personal Restraint of Yim*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999) (citations omitted).

There are two published cases of which the State is aware in which the immigration consequences of a guilty plea are addressed and the plea is allowed to be withdrawn on appeal. One is *State v. Littlefair*, 112 Wn. App.

749, 51 P.3d 116 (2002). The other is *State v. Holley*, 75 Wn. App. 191, 876 P.2d 973 (1994). The relevant facts are similar in both.

In both cases, defendants entered the United States as young children, and although raised here, did not become citizens for unknown reasons. Littlefair was born in Canada, but raised in New Jersey. *State v. Littlefair*, *supra*, at 752. Holley was born in Ethiopia, orphaned, and then adopted and brought to the United States. *State v. Holley*, *supra*, at 192. In both cases, trial counsel did not know that their client was not a citizen, and thus were not concerned that the provision of the Statement on Plea of Guilty implementing RCW 10.40.200 would apply to the defendant. *State v. Littlefair*, *supra*, at 754-755; *State v. Holley*, *supra*, at 195. These defendants were in effect prejudiced by the assumptions of their counsel – regardless of the likely reasonableness of these assumptions, they were still assumptions. Treating these non-citizens as though they were citizens, subsequently failing to perceive potential immigration consequences, (because citizens do not get deported) thus becomes direct misadvice. This may well be the ineffective assistance of counsel that Petitioner asserts it to be.

The facts in this case are not similar. Trial counsel was aware that the Petitioner was not a citizen. He did in fact leave the relevant provision of the Statement on Plea of Guilty in place, as it should have been. CP at 27. Trial counsel did consider the issue, and came to a conclusion he believed to be reasonable based on his experience with regard to the response of Federal Agents to similar facts. Such conduct has been found to be adequate in a very similar context. "By informing Malik that deportation was a possibility and urging him to seek the advice of an attorney skilled in that field, Malik's trial counsel discharged his responsibilities in a constitutionally sufficient manner." *State v. Malik*, 37 Wn. App. 414, 417, 680 P.2d 770 (1984).

Any further action by trial counsel was not required and might have been of questionable propriety. Counsel was appointed to represent Petitioner in the criminal case. Affidavit of Attorney Robert E. Schiffner, at 1. Deportation is not merely a potential collateral consequence of criminal conviction. It is a civil proceeding, and trial counsel was not appointed for a civil proceeding. "The possibility of deportation, being collateral, was not properly a concern of appointed counsel." *State v. Malik*, *supra*, at 416-417. Petitioner asserts that trial counsel had a "far greater" obligation to provide

certain advice, but the materials used to support the assertion are not controlling authority in this State. The *Malik* case is.

3-4. Petitioner has cited no authority to support the position asserted in his third and fourth issues presented for review. A court is entitled to conclude that the failure of counsel to cite authority means that no authority exists supporting counsel's position. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Washington case law has consistently held that a court is not obligated to search out authority to support a party's position. *See*, for example, *State v. Chapman,* 140 Wn.2d 436, 453, 998 P.2d 282, *cert. den.,* 531 U.S. 984, 121 S. Ct. 438, 148 L. Ed. 2d 444 (2000).

> Only one of the eight appellate briefs filed in these cases refers to the privacy section of our state constitution, Const. art. 1, § 7. As far as the record before us reflects, the parties neither raised nor discussed this issue at the trial court level in either case. As expressed by the Eighth Circuit, "**naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.**" *United States v. Phillips,* 433 F.2d 1364, 1366 (8th Cir.1970). *See*

> *also Null v. Grandview,* 669 S.W.2d 78, 81 (Mo.Ct.App.1984); *State v. Perbix,* 349 N.W.2d 403, 404 (N.D. 1984). The constitutional argument made in the cases before us does not merit our consideration, and we therefore decline to consider it.
> *In re Rosier,* 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). (Emphasis added.)

There apparently being no support for the position asserted, the Court should not give these any consideration.

D. CONCLUSION

Petitioner's vigorous claims to the contrary, he presents no basis upon which he is entitled to the relief sought. The assistance provided by counsel was not ineffective and even if it were, did not prejudice the Petitioner. In order to obtain the relief Petitioner seeks, both prongs of the test must be satisfied. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilt plea.

Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (citations omitted).

Petitioner does not raise any question about the fact of his guilt, apparently because there is no such question. This Court should not consider the assertions of Petitioner with regard to the immigration consequences of this case in isolation, but in the light of all of the circumstances. *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). After having done so, it will be readily apparent that Petitioner did in fact make an intelligent choice among the options available, and that the decision of the Court of Appeals should be affirmed.

Dated this 27th day of May 2009.

Respectfully submitted,

D. ANGUS LEE
Prosecuting Attorney

Douglas R. Mitchell - WSBA #22877
Deputy Prosecuting Attorney

APPENDIX "A"

IN THE COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. VALENTIN SANDOVAL, Appellant.	No. AFFIDAVIT OF ATTORNEY ROBERT E. SCHIFFNER

1. I am attorney Robert E. Schiffner, licensed to practice law by the State of Washington, Bar No. 20048. I have been a member in good standing of the Washington State Bar since 1990. I practice in Moses Lake, Washington. I currently practice mainly in the area of criminal defense. I was appointed as a public defender to represent Valentin Sandoval.

2. Mr. Sandoval was charged on August 14, 2006 with Rape in the Second Degree in the Grant County Superior Court.

3. I filed my Notice of Appearance to represent Mr. Sandoval on August 21, 2006.

4. I was aware that Mr. Sandoval was not a U.S. citizen and that his immigration status was that of a green card holder (U.S. Permanent Resident.)

5. In late September of 2006, I counseled Mr. Sandoval regarding a plea offer by the State. Mr. Sandoval was very concerned whether or not he would be released from jail if he were to plead guilty. He did not want to plead guilty if the end result were that he should be immediately deported.

6. Previously, in similar cases, my non-citizen clients have succeeded in avoiding deportation, so long as they did not remain in custody for more than a few hours after they were sentenced. I believed that this would also occur with Mr. Sandoval's case. Based on this previous behavior of the immigration officials, I believed that Mr. Sandoval would be able to avoid being taken into immediate immigration custody and deported.

7. I told Mr. Sandoval that he should accept the State's plea offer because he would not be immediately deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea.

8. After Mr. Sandoval entered his guilty plea, the Border Patrol immediately put a hold on him from leaving the jail and I understand that he was immediately put into deportation proceedings. My advice to Mr. Sandoval was unfortunately incorrect.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed this 11th day of April, 2007 in Moses Lake, Washington.

Robert Schiffner

Robert Schiffner